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No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1947

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., A CORPORATION, PETITIONERS

v.

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (R. 271–275) is not reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 286) is reported at 158 F. 2d 95.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 6, 1946 (R. 287). The

petition for a writ of certiorari was filed March 1, 1947, and was granted on April 14, 1947, limited to the first question presented by the petition (R. 289). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Postmaster General is an indispensable party to an action to restrain a local postmaster from carrying into effect a postal fraud order issued by the Postmaster General, and to vacate such order and declare it void.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

1. R. S. 3929, as amended (39 U. S. C. 259) provides in pertinent part:

> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or

company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. * * *

R. S. 4041, as amended (39 U. S. C. 732) provides in pertinent part:

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as

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a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

2. Rules 12 (b), 12 (h), and 19 (b) of the Federal Rules of Civil Procedure are as follows [1947 amendments are in italics]:

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * * * *

(b) *How Presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) *failure to join an indispensable party.* A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

* * * * *

(h) *Waiver of Defenses.*—A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, *the defense of failure to join an indispensable party,* and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense,

if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

* * * * *

Rule 19. Necessary Joinder of Parties.

* * * * *

(b) *Effect of Failure to Join.*—When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

STATEMENT

Petitioners herein are Al Williams who conducts various "weight reducing" enterprises in Los Angeles, California, and the Al Williams Health System of Los Angeles, Inc., a corporation

which alleges that it neither had nor has any interest or participation in any reducing plan or program conducted through the use of the mails (R. 233–234). The corporation was neither named nor did it participate in any of the fraud order proceedings hereinafter discussed.

On May 25, 1945, the Post Office Department furnished petitioner Al Williams with a memorandum charging him and variously named enterprises which he owned and operated (R. 235) with violations of the postal fraud statutes in connection with sales through the mails of tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and a "Special Body Massage Creme," and ordered them to show cause why a fraud order should not issue (R. 45, 236). An answer was filed denying the charges (R. 52–56). A hearing was held at Washington, D. C., on June 20, 1945, at which petitioner Williams appeared and was represented by counsel (R. 44).

At the close of the hearing, Williams was furnished a copy of the transcript of the hearing (R. 227). He subsequently moved to reopen the case for the reception of additional testimony to be taken by deposition in Los Angeles, California (R. 228, 260–264). This motion was denied (R. 228, 264). Thereafter, Williams moved that "all possible scientific tests be made and obtained by the Post Office Department to determine the efficacy of the tablets sold by [petitioners] for

the elimination or prevention of hunger when used in connection with the reducing plan" (R. 228). This motion was also denied (R. 228).

The Solicitor of the Post Office Department made findings of fact based primarily on the testimony of a physician who has specialized in obesity, its causes and treatment, and recommended that a fraud order be issued (R. 219–228). The physician had testified in substance that, contrary to petitioner's representations (R. 59–61, 69, 70), the challenged diet was a "strict low calorie diet" (R. 121) and that such a diet would be harmful and dangerous to many obese persons if followed without proper medical supervision (R. 110, 116–119, 128, 137), which he testified petitioner's plan did not offer (R. 115–116). Thereafter on December 10, 1945, the Acting Postmaster General issued an order in the usual form addressed to the postmaster at Los Angeles, California, forbidding him to pay any money order drawn to the order of Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System. The order also directed him to inform the remitter of such money order that payment had been forbidden, and to return all letters so addressed with the word "Fraudulent" written or stamped upon the outside thereof (R. 257–258). Respondent received a copy of this order on December 12, 1945 (R. 258).

On January 7, 1946, petitioners filed in the United States District Court for the Southern District of California, Central Division, a complaint against respondent, "Individually and as Postmaster of the City of Los Angeles, California."[1] Petitioners alleged that they were informed that pursuant to the fraud order and only by reason thereof, respondent since December 12, 1945, had stamped and returned, in accordance with the fraud order, all mail addressed to petitioner Al Williams and the other parties named in the fraud order (R. 266). It was further alleged on information and belief that although petitioner, Al Williams Health System of Los Angeles, Inc., a corporation, is not named in the fraud order, respondent would continue so to dispose of all of petitioners' mail addressed to them, to the designations enumerated in the order or to any designation by which petitioners might be known (R. 267). Claiming that because of the deprivation of a full and impartial hearing, petitioners' rights had been grossly violated (R. 260, 264), and that in addition the fraud order, being "unsupported by any substantial evidence in fact", was "issued without and beyond the authority and jurisdiction of the Postmaster General, and

[1] Jurisdiction was invoked under Section 24 (6) of the Judicial Code (28 U. S. C. 41 (6)). (R. 2, 231.)

The complaint was subsequently amended to eliminate the constitutional questions raised in the original complaint. (Compare R. 231–270 with R. 1–43; see Pet. 3, 17.)

of said Post Office Department, and beyond the authority conferred upon them by the Acts of Congress" (R. 259), the complaint prayed that the order be vacated and decreed to be void; that respondent be enjoined from carrying out the order and that he be directed to proceed and continue with the regular delivery of all mail addressed to petitioners and the other names designated in the order (R. 269).[2] Respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 229).

The district court held that since the Postmaster General had not been joined as a party, it was bound to dismiss the complaint under *Neher* v. *Harwood*, 128 F. 2d 846, certiorari denied, 317 U. S. 659, where the Circuit Court of Appeals for the Ninth Circuit had held that in such proceedings the Postmaster General was an indispensable party (R. 274–275, 276). On appeal, the court below affirmed *per curiam* upon the authority of the cited case (R. 286). The substantive question is not now before this Court (R. 289).

SUMMARY OF ARGUMENT

A. Under the decisions of this Court (*Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Gnerich*

[2] Copies of the transcript of the proceedings (R. 44–218) and of the "Memorandum for the Postmaster General Embodying a Finding of Fact and Recommending the Issuance of a Fraud Order" (R. 219–228) were filed with the complaint as Exhibits A and B, respectively.

v. *Rutter*, 265 U. S. 388; *Webster* v. *Fall*, 266 U. S. 507) which antedated *Colorado* v. *Toll*, 268 U. S. 228, the Postmaster General would be an indispensable party to a suit to restrain the carrying out of a postal fraud order and such an action would unquestionably have been dismissed in his absence if the infirmity had been called to the Court's attention. The relief sought in such a proceeding is against the action taken by the Postmaster General, and not the local postmaster, such as respondent here, for under the applicable statutes the order could only have been issued by the Postmaster General "upon evidence satisfactory to him." The Postmaster General is the public's real representative in the proceeding; it is his hands which would be tied if the injunction prayed by petitioners were to issue. Plainly then the Postmaster General has an interest which would be affected by the issuance of the injunction. He is therefore an indispensable party in whose absence the proceeding may not be maintained. The only basis for even proceeding against local postmasters stems from the fact that fraud orders are couched in terms requiring local postmasters to take action. But the local postmasters act merely as agents of the Postmaster General; they have neither power nor discretion in the matter.

Considerable uncertainty as to whether the superior is an indispensable party to an action against the subordinate has resulted from this

Court's decision in *Colorado* v. *Toll*, 268 U. S. 228, where it was held that an action to enjoin enforcement of the superior officer's regulation could proceed against a subordinate in the absence of the superior. This Court has however subsequently indicated that the rule stated in its prior decisions is still valid.

The majority of the circuit courts of appeals have held that the *Warner Valley*, *Gnerich* and *Webster* cases were not overruled by *Colorado* v. *Toll*, and have tended to follow the former line of cases, endeavoring to find some basis for distinction between the decisions. Some courts distinguish the *Toll* case on the ground that it involved a proceeding brought by a State. Some hold that where the act complained of exceeds the subordinate's constitutional or statutory power the superior need not be joined, but that he is an indispensable party if the action attacks an exercise of discretion within the scope of his statutory authority. Other courts hold that where the subordinate has merely carried out the superior's order the latter must be joined, and that the subordinate may be sued alone only where he has deviated from the terms of the order so that the acts complained of are in fact his own. Still others hold that the question of the superior's indispensability is to be determined on considerations of the plaintiff's convenience, i. e., that it is burdensome to force him to bring his action against the superior officer at the seat of government.

B. If the suggested distinctions resting on reconciliations or rationalization of the two lines of authority in this Court have any validity, then the Postmaster General, who alone has power to issue a fraud order, is an indispensable party to any proceeding to enjoin the enforcement of such an order or to set it aside. But the basic difficulty with the attempted reconcilations is that the cases in this Court, fairly read, cannot be reconciled.

The balance of convenience rule does not answer the problem either. To begin with, the rule as to indispensable parties, which comes close to being jurisdictional and which is based upon "the plainest principles of justice", is not one which can be waived in the exercise of the chancellor's discretion. Moreover, the considerations of convenience are not all on the plaintiff's side. There is a public interest involved, which, regardless of the validity or otherwise of the particular official act under consideration, is prejudiced by inadequate or uninformed representation of public officers. Where, as in postal matters, administration is centralized, the quality of the defense is adversely affected by permitting suit to proceed against the distant subordinate, because of the time factor and because the defending attorney is hampered in his access to the facts and out of touch with his real client. The corresponding inconvenience occasioned a plaintiff required to sue in the District of Columbia does not affect the

presentation of his case, and is moreover an inescapable consequence of the fact that ours is a vast country with only a single capital. In view of the circumstance that the plaintiff must defend the charge of postal fraud at a hearing in Washington, it cannot be deemed an unusual inconvenience to require him to sue in Washington if he later feels himself aggrieved by the result of that hearing. The statute book is full of instances where, on the one hand, Congress has prescribed centralized judicial review of administrative action, and, on the other, has provided for decentralized review. In the class of cases here under consideration it is not for the courts, by introducing concepts of convenience which Congress had not seen fit to write into the postal statutes, to permit a fraud order issued by the Postmaster General to be set aside in his absence.

C. So far as the present cause is concerned, the judgment below can be supported on most of the distinctions made in respect of the cases decided by this Court. But that would not settle the law. If there is to be certainty and a workable rule in the future, one or the other of the applicable decisions must yield.

The *Warner Valley-Gnerich-Fall* line of cases is consistent with accepted equitable rules regarding indispensable parties; it is consistent with the Federal Rules of Civil Procedure; and it is consistent with decisions dealing with indispensable parties in litigation against defendants not hold-

ing public office. *Colorado* v. *Toll*, on the other hand, is inconsistent at each of these points. There is, moreover, every reason why a public officer should have the same right as a private defendant to hearing and notice before his acts are enjoined or set at naught.

We think the true rule is that an action seeking equitable relief can proceed in the superior's absence only when the subordinate's authority, within the statute and within the directions given by his superior, is sufficient to grant the relief sought, but that, where all power and all discretion are vested in the superior, and where the order or decision attacked has been made by the superior, then he is an indispensable party, and relief cannot be given in his absence.

This rule is consistent with established equitable principles, it is workable, and it does not break down in verbal distinctions. Its foundation would involve the end of *Colorado* v. *Toll*, 268 U. S. 228, but there is respectable precedent for such disposition of "a departure" which was "a source of embarrassment and confusion in other courts", and which "on further consideration we feel constrained to pronounce * * * essentially unsound." *Lee* v. *Chesapeake & Ohio Ry.*, 260 U. S. 653, overruling *Ex parte Wisner*, 203 U. S. 449. Courts and litigants alike would profit from the resultant certainty, and Congress would still be free to provide for decentralized judicial review whenever it deemed such a step to be in the public interest.

ARGUMENT

THE POSTMASTER GENERAL IS AN INDISPENSABLE PARTY TO AN ACTION BROUGHT TO RESTRAIN THE ENFORCEMENT OF A POSTAL FRAUD ORDER OR TO VACATE SUCH AN ORDER AND DECLARE IT VOID; AND THE ACTION MAY NOT BE MAINTAINED IN HIS ABSENCE

The narrow question presented by this case, whether the Postmaster General is an indispensable party to an action brought against a local postmaster to restrain the carrying out of a postal fraud order issued by the Postmaster General and to vacate such an order on the ground that it is void, is one aspect of the general question whether and in what circumstances a superior officer of the United States is an indispensable party to a proceeding brought to enjoin a subordinate.

The postal fraud statutes (R. S. 3939, 4041, *supra*, pp. 2–4) provide that fraud orders are to be issued by the Postmaster General, and that they may be issued only "upon evidence satisfactory to him." There is nothing in these statutes authorizing the Postmaster General to delegate this discretion to local postmasters or to anybody else, and the orders are in fact issued by the Postmaster General and are signed by him. The hearing which precedes the issuance of such an order is held in Washington, and the Post Office Department has neither procedure for testimony by depositions nor any power to subpoena witnesses. See *Administrative Procedure in Gov-*

ernment Agencies: Post Office Department, Sen. Doc. 186, 76th Cong., 3d sess., Part 12, pp. 15–38. The statutes which authorize the issuance of fraud orders do not provide for any judicial review of such orders. The judicial review which may be obtained is based exclusively upon the right of the courts to enjoin an illegal withholding of mail by the Postmaster General. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109.

The local postmaster is only the ministerial arm of the Postmaster General in carrying out the fraud order; he has no knowledge as to the basis of the order; no discretion is reposed in him either as to the issuance or the enforcement of the fraud order; and since the Postmaster General, his superior, has unquestioned power to issue the orders, once the order is issued the local postmaster has no choice but to execute the fraud order in accordance with its terms. The power, responsibility and discretion in regard to the issuance of fraud orders is vested in the Postmaster General, and hence, it is he who is the public's real representative in the matter. It is his hands which would be tied if the injunction prayed by petitioners were to issue. In these circumstances, we submit that the presence of the Postmaster General is indispensable to an action attacking the validity of a fraud order issued by him such as that here involved, and that his absence is fatal to maintenance of the proceeding.

Although this Court has never passed on the specific question whether the Postmaster General is an indispensable party to a suit to restrain the carrying out of a postal fraud order, an examination of the decisions of this Court in regard to the general question whether a superior officer was an indispensable party to a suit brought against his subordinate indicates that prior to *Colorado* v. *Toll*, 268 U. S. 228, suits to restrain the carrying out of postal fraud orders would unquestionably have been dismissed in the absence of the Postmaster General if that infirmity had been called to the Court's attention. Since *Colorado* v. *Toll*, however, the law has been in a state of uncertainty, as the attempts of the several circuit courts of appeals to resolve the decisions show. In *Brooks* v. *Dewar*, 313 U. S. 354, this Court declined to pass upon the question of the superior's indispensability as a party and other questions related thereto, saying (313 U. S. at 359–360),

> We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below are sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits.

Now, however, the question is squarely raised.

We propose at the outset to state the cases decided by this Court, and then to set out the state of the law in the various circuits. Next, we analyze all the decisions in an attempt to ascertain whether a workable rationale, which turns on substance and not on accidents of pleading, can be extracted from the authorities. Finally, we submit what we believe to be a sound and practical rule of decision for this and similar cases involving prayers for equitable relief.

A. THE DECIDED CASES

(1) *Decisions of this Court*

The first case in which this Court considered the question was *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28. There the bill sought to enjoin the then Secretary of the Interior and the Commissioner of the General Land Office, and their subordinates, from "assuming to exercise further jurisdiction with respect to the disposition of" certain lands and from "further trespassing upon [plaintiff's] right of quiet possession thereof." It further prayed that the then Secretary of the Interior be directed to issue patents for these lands to plaintiff. While the case was on appeal to this Court, the Secretary of the Interior resigned, so that as to him the suit abated. At that time, there was no way to

bring his successor into the suit. This Court held that the suit could not proceed against the Commissioner alone, saying (pp. 34–35):

> The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13.

In so holding this Court cited the decision of Lord Chancellor Hardwicke in *Vernon* v. *Blackerby*, 2 Atk. 144, 146, s. c. Barnardiston Ch. 377, dismissing as preposterous a bill against a subordinate praying that he distribute funds which Parliament had placed in the control of his superiors.

The same question arose in *Gnerich* v. *Rutter*, 265 U. S. 388, decided in June 1924. There the plaintiffs claimed that the limitation as to their sales of liquor in the permit issued them as licensed pharmacists under the National Prohibition Act was void and beyond authority vested in the prohibition commissioner by the pertinent regulations. The Commissioner of Internal Revenue was responsible for the administration of that Act. He had, as authorized by the Act, issued regulations which provided for and designated a

prohibition commissioner as his general agent to issue and sign permits to sell liquor at retail, and which also provided for local prohibition directors to issue and sign permits to purchase liquor for use and sale under the permits last mentioned. Plaintiffs' permit to sell liquor had been issued and signed by the prohibition commissioner, who in the exercise of the discretion vested in him by the regulations had imposed the condition complained of. Plaintiffs brought suit against the local prohibition director, who had refused to issue to them permits to purchase in excess of this limitation, seeking to restrain him from giving effect to the limitation. Although the Commissioner of Internal Revenue had delegated his authority and discretion to issue permits to the prohibition commissioner and prohibition directors and the permit in question had been issued by the prohibition commissioner, who had imposed the limitation within the scope of the discretion delegated him, the Court, quoting *Warner Valley* v. *Smith, supra,* held that the Commissioner of Internal Revenue was an indispensable party to the proceeding. Mr. Justice Van Devanter said (265 U. S. at 391–392):

> The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are

> responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations.

At the next Term the question of whether the superior officer is an indispensable party to a suit against his subordinate was again raised in *Webster* v. *Fall*, 266 U. S. 507, decided in January 1925. There, an incompetent Osage Indian claimed that he was entitled to payments under the Act of March 3, 1921, c. 120, 41 Stat. 1249, 1250. That Act required the Secretary of the Interior to cause to be paid $1000 quarterly to such Osage Indians, payments to be made under the supervision of the Superintendent of the Osage Agency. But payment was withheld from plaintiff under the authority of R. S. 2087.[3] Plaintiff in his bill for mandatory injunction to compel payment of the money alleged that in so far as he was concerned R. S. 2087 and all orders,

[3] This section (25 U. S. C. 130) provides in part: "No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians * * *."

rules or regulations issued thereunder by the Secretary of Interior were unconstitutional. The Secretary of Interior was named as a party to the suit but no service was made upon him and he did not appear. This Court held on the authority of the *Gnerich* and *Warner Valley* cases that "the suit was one which required the presence of the Secretary, and the bill should have been dismissed for want of a necessary party." (266 U. S. at 510.) Quoting the language from *Gnerich* v. *Rutter*, set out *supra*, pp. 21–22, the Court said (266 U. S. at 510):

> The statutory direction to cause quarterly payments to be made (subject to § 2087) is addressed to the Secretary. The power and responsibility are his. Neither Wright nor Wise has any primary authority in the matter. They can act only under, and in virtue of, the Secretary's general or special direction. In the absence of it no payments or disbursements properly can be made. Authority in the Superintendent to supervise such payments is not authority to cause them to be made.

The Court refused to give any weight to the cases cited by petitioner where, although the suit had been brought against subordinate officials without joining the superior, the cause had been determined on the merits,[4] since "in none of them

[4] E. g., *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Swigart* v. *Baker*, 229 U. S. 187; *Hill* v. *Wallace*, 259 U. S. 44, cited for the petitioner, 266 U. S. at 508.

was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (266 U. S. at 511.)

However, in May 1925, less than five months later and at the same Term, the Court held in *Colorado* v. *Toll*, 268 U. S. 228, that the action there brought could be maintained without the superior officer. That case involved a bill by the State of Colorado to enjoin the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which were alleged to be beyond the authority conferred by Congress and to interfere with the sovereign rights of the state over the park roads. The statute there involved (Act of January 26, 1915, c. 19, 38 Stat. 798) put the park under the control of the Secretary of Interior and made it his duty to make reasonable regulations for its management. The brief for the Superintendent had urged *inter alia* that the bill should be dismissed for failure to join the Secretary of Interior, citing the *Warner Valley*, *Gnerich* and *Webster* cases. Br. for Appellee, No. 234, Oct. T. 1924, at 12–13. The Court, with-

out referring to any of these cases, held instead (268 U. S. at 230):

> The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. *Missouri* v. *Holland*, 252 U. S. 416, 431. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620.[5]

Apart from passing over the question in *Brooks* v. *Dewar*, 313 U. S. 354, see p. 18, *supra*, this Court has, since the decision in *Colorado* v. *Toll*, expressly adverted to the question of indispensability of a superior officer only once, *Miguel* v. *McCarl*, 291 U. S. 442, and there it indicated that it considered the *Warner Valley*, *Gnerich* and *Webster* cases as uninfringed by *Colorado* v. *Toll*. In the *Miguel* case suit was brought against, *inter alia*, the Chief of Finance of the Army for an injunction directing him to disburse

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[5] We discuss below, pp. 38–39, 42–43, the significance of the authorities relied upon. It may be noted at this juncture, however, that in *Missouri* v. *Holland*, a suit against a subordinate, the question of the indispensability *vel non* of the superior was not raised; and in *Philadelphia Co.* v. *Stimson* the suit was brought against the superior—the Secretary of War—and the only question was whether in the circumstances it was a suit against the United States.

retired pay to a Philippine Scout. This Court in discussing the propriety of the requested relief stated (291 U. S. at 455):

> The Chief of Finance is charged by law with the duty of disbursing all funds of the War Department, including the pay of the army. U. S. C., Title 10, § 172. The disbursing officer to whom the voucher was presented for payment, therefore, is simply a subordinate of the Chief of Finance, subject to his control and direction, and the suit was properly brought against the latter. The purpose of the suit was to control the action of the Chief of Finance, that is, to compel him to pay or cause to be paid the voucher in question. The disbursing officer as the mere agent of his superior officer is not an indispensable, although he might have been joined as a proper party. Compare *Warner Valley Stock Co.* v. *Smith, supra,* pp. 34–35; *Gnerich* v. *Rutter,* 265 U. S. 388, 391–393; *Webster* v. *Fall,* 266 U. S. 507; *Alcohol Warehouse Corp.* v. *Canfield,* 11 F. 2d 214; *Dami* v. *Canfield,* 5 F. 2d 533.

(2) Decisions in the several circuits

In all of the circuit courts of appeals which have considered the present question, save one—the Sixth Circuit, as to which see *infra,* pp. 33–34—the decisions have resolved themselves into consideration of the effect of *Colorado* v. *Toll* on the three earlier cases in this Court. The problem for the lower federal courts has largely been one

of attempting to reconcile the result and the reasoning in the *Toll* case with the result and the reasoning in the *Warner Valley, Gnerich,* and *Fall* cases.

a: The majority of the circuit courts of appeals have followed the *Gnerich* v. *Rutter* line of authority in preference to the *Colorado* v. *Toll* apparent departure therefrom; but, as will be seen, uncertainty has developed even among these courts in consequence of their efforts to harmonize the decisions of this Court and to find a rational basis for distinction between them. The Circuit Courts of Appeals for the Second Circuit, the Third Circuit, and the Tenth Circuit have held that *Gnerich* v. *Rutter* is unaffected by *Colorado* v. *Toll*. *National Conference on Legalizing Lotteries, Inc.* v. *Goldman,* 85 F. 2d 66 (C. C. A. 2) (suit to enjoin enforcement of postal fraud order can not be maintained in absence of Postmaster General); *Alcohol Warehouse Corp.* v. *Canfield,* 11 F. 2d 214 (C. C. A. 2); *Reichle* v. *Federal Reserve Bank,* 34 F. 2d 910, 916 (C. C. A. 2); *Jewel Productions Inc.* v. *Morgenthau,* 100 F. 2d 390 (C. C. A. 2); *Chamberlain* v. *Lembeck,* 18 F. 2d 408 (C. C. A. 3); *Doran* v. *Charles D. Kaier Co.,* 60 F. 2d 259 (C. C. A. 3); *Jump* v. *Ellis,* 100 F. 2d 130, 135 (C. C. A. 10), certiorari denied, 306 U. S. 645.

The Second Circuit has suggested that *Colorado* v. *Toll* might be distinguishable since it involved the quasi-sovereign rights of a state. Support for

this view can be found in the Court's language in that case (268 U. S. at 230) and in its citation there of *Missouri* v. *Holland*, 262 U. S. 416, 431. See *National Conference on Legalizing Lotteries, Inc.* v *Goldman*, 85 F. 2d 66 (C. C. A. 2); cf. *Carr* v. *Desjardines*, 16 F. Supp. 346, 349 (W. D. Okla.). Under that distinction, of course, *Colorado* v. *Toll* does not affect the postal fraud order cases, all of which are brought by individuals; those cases cannot proceed in the absence of the Postmaster General, and the Second Circuit so held in the *Lotteries* case, *supra*; see also *Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.). Moreover, the Second Circuit holds the Postmaster General to be an indispensable party, not only in fraud order cases, but also in other situations involving the business of the Post Office Department. *Transcontinental and Western Air* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603 (annulment of air mail contracts); *Viking Press* v. *Goldman*, 38 F. Supp. 1014 (S. D. N. Y.) (classification of mail matter for rate purposes); *Hardy* v. *Goldman*, 38 F. Supp. 1011 (S. D. N. Y.) (exclusion of matter from the mails).

b. The Circuit Court of Appeals for the Ninth Circuit and perhaps that for the Fourth Circuit follow *Gnerich* v. *Rutter* and *Webster* v. *Fall* in cases such as the instant one, where the discretion of the superior appears to be involved. *Neher* v. *Harwood*, 128 F. 2d 846 (C. C. A. 9), certiorari

denied, 317 U. S. 659 (Postmaster General indispensable party to suit to enjoin postal fraud order); *Dolphin* v. *Starr*, 130 F. 2d 868 (C. C. A. 9) (postal fraud order suit); *Moore* v. *Anderson*, 68 F. 2d 191 (C. C. A. 9), certiorari denied, 293 U. S. 567; *Moody* v. *Johnston*, 66 F. 2d 999 (C. C. A. 9); *Appalachian Elec. Power Co.* v. *Smith*, 67 F. 2d 451 (C. C. A. 4), certiorari denied, 291 U. S. 674; *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. C. A. 4); see *Blair* v. *McAlhaney*, 123 F. 2d 142 (C. C. A. 4). But these courts follow *Colorado* v. *Toll* where the plaintiff alleges a total lack of statutory authority in the defendant officer. *Berdie* v. *Kurtz*, 75 F. 2d 898 (C. C. A. 9); *Darger* v. *Hill*, 76 F. 2d 198 (C. C. A. 9); cf. *Ferris* v. *Wilbur*, 27 F. 2d 262 (C. C. A. 4). This distinction was formulated by the Ninth Circuit in *Neher* v. *Harwood, supra*, after the Second Circuit in the *Lotteries* case had remarked (85 F. 2d at 66) that "the Ninth has decided the point both ways."

c. The position of the Fifth Circuit on this question defies classification. In its first three decisions, that court seemed to hold that *Colorado* v. *Toll* had overruled the *Warner Valley-Gnerich-Fall* line of authority, as it followed the *Toll* case even in situations where the bill attacked the

[6] We discuss below, pp. 40–42, the circumstances that the Ninth Circuit formulated its distinction in consequence of incorrectly reading *Webster* v. *Fall* as not involving the constitutionality of the statute there in question. Compare 128 F. 2d at 849 with 266 U. S. at 509.

exercise of discretionary authority by the absent superior. *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435 (C. C. A. 5); *Ryan v. Amazon Petroleum Corporation*, 71 F. 2d 1 (C. C. A. 5), reversed on other grounds, 293 U. S. 388; *Rood* v. *Goodman*, 83 F. 2d 28 (C. C. A. 5), certiorari denied, 299 U. S. 551 (construed as not being a suit to set aside the Postmaster General's fraud order, but as one to enjoin interference with the mail by the local postmaster).[7] The Second Circuit has so read the Fifth's decisions. *Lotteries* case, *supra*, 85 F. 2d at 66. The Ninth Circuit, however, reads two of the Fifth Circuit decisions, *Yarnell* and *Ryan*, as consistent with its own rationalization of this Court's decisions set out in *Neher* v. *Harwood*, 128 F. 2d 846, *supra*, and considers that in the *Rood* case the Fifth Circuit appeared to doubt the correctness of the rule which it was applying.[8] But, in its fourth and

[7] In the case at bar, the complaint seeks both to enjoin the local postmaster's enforcement of the order and also to vacate the order itself (R. 269–270).

[8] Because, as the Ninth Circuit noted, 128 F. 2d at 851, the Fifth Circuit closed its opinion by pointing out that since it was affirming the district court's denial of relief, there would be an end to litigation and no prejudicial harm could come from its holding. 83 F. 2d at 32. The correct procedure in such a case is not to affirm, but to reverse with directions to dismiss for want of a necessary party. *Gnerich* v. *Rutter*, 265 U. S. at 393; *Alcohol Warehouse Corporation* v. *Canfield*, 11 F. 2d 214, 216 (C. C. A. 2).

We discuss below, pp. 46, the circumstance that the Fifth Circuit rested its decision in part on cases which this Court in *Webster* v. *Fall* had held to be not controlling. 83 F. 2d at 31.

latest decision, the Fifth Circuit declined to entertain a suit to enjoin enforcement of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 206, 207) which was brought solely against a local inspector of the Wage & Hour Administration. *Janes* v. *Lake Wales Citrus Growers Association*, 110 F. 2d 653 (C. C. A. 5). In that case, the Court ignored *Rood* v. *Goodman* and stated: "If [the petitioners] wish a test in equity they ought to go to a jurisdiction where more responsible parties can be found." 110 F. 2d at 654.*

d. No other circuit court of appeals, so far as we are aware, has dealt with the present question in terms of reconciling *Colorado* v. *Toll* with the earlier cases in this Court.

(i) A three-judge district court in the First Circuit followed the *Gnerich* line in *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941 (D. Mass.), which held that the Secretary of Agriculture was an indispensable party in a suit attacking the constitutionality of the Marketing Agreement Act of

*In *Hawthorne* v. *Fisher*, 33 F. Supp. 891 (N. D. Tex.), a three-judge court consisting of Circuit Judge Hutcheson and two district judges held that the Secretary of Agriculture was an indispensable party to an action to enjoin enforcement of the Agricultural Adjustment Act, 7 U. S. C. § 1281 *et seq.*, pointing out that enforcement of the Act is vested exclusively in the Secretary. The Court relied on the *Gnerich* and *Lotteries* cases, stated that *Colorado* v. *Toll* laid down no different rule, and passed over *Rood* v. *Goodman* in silence.

1937, 50 Stat. 246, 7 U. S. C. 601 note, 608 (b) *et seq.*, and seeking to enjoin its enforcement. The District Court for Massachusetts held in *Gargilis* v. *Gleavy*, 45 F. Supp. 721, that the Postmaster General was an indispensable party in an action to enjoin enforcement of a postal fraud order; and, in a decision by another judge, that the Secretary of War was not an indispensable party in an action brought against a subordinate military commander which sought to enjoin an order issued by the subordinate in his own name under a full delegation of authority from the Secretary. *Von Knorr* v. *Miles*, 60 F. Supp. 962, 968, judgment vacated for lack of jurisdiction *sub nom. Von Knorr* v. *Griswold*, 156 F. 2d 287 (C. C. A. 1).

(ii) The District Court for Eastern Wisconsin has advanced another distinction, viz., that the superior is an indispensable party where the subordinate has merely fulfilled the ministerial function of carrying out the superior's order, but not where the proceeding is based on the contention that the subordinate has deviated from the course directed by the superior. *Ernest* v. *Fleissner*, 38 F. Supp. 326. The rationale of this approach is that in the first instance the acts of the subordinate are in fact those of the superior, whereas in the second the deviations are solely the acts of

the subordinate and cannot be imputed to the superior.[10]

e. The Sixth Circuit, alone among the circuit courts of appeals which have struggled with the problem, has refrained from attempting to reconcile the *Warner Valley-Gnerich-Fall* cases with that of *Toll*.

Instead, it has undertaken, initially in a suit to restrain the carrying out of a postal fraud order, to decide whether to dismiss the suit in the absence of the superior, in that case the Postmaster General, ostensibly by balancing the conflicting considerations of convenience of the respective parties as disclosed in the record before it. As a result of such balancing, the court concluded that, although the Postmaster General is clearly an indispenable party as that term is usually defined, dismissal of the suit because of his absence would put the plaintiff to the inconvenience and the substantial, if not prohibitive expense, of bringing a new proceeding in the District of Columbia. This the Sixth Circuit regarded as unjust and inequitable, particularly since the Postmaster General might voluntarily appear locally, and because there is a United States Attorney in every judicial district who

[10] See also *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.); cf. *Wheeler* v. *Farley*, 7 F. Supp. 433 (S. D. Cal.), appeal dismissed, 293 U. S. 526; *Tribal Council &c* v. *Ickes*, 58 F. Supp. 584 (D. Mont.).

could defend him. Accordingly, it held that the proceeding could be maintained despite the absence of the Postmaster General. *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116 (C. C. A. 6); cf. *Varney* v. *Warehime*, 147 F. 2d 238 (C. C. A. 6), certiorari denied, 325 U. S. 882 (suit brought against local agents of War Food Administration to enjoin enforcement of Food Distribution Order No. 79 issued by the War Food Administrator for the regulation of milk handlers allegedly void and beyond statutory power; on merits held not entitled to injunction); *Greer* v. *Cline*, 148 F. 2d 380 (C. C. A. 6) (suit by owners of one tobacco market against local agents of the War Food Administrator to enjoin assignment of additional tobacco inspectors to another market under Tobacco Inspection Act of August 23, 1935, 49 Stat. 731, 7 U. S. C. 511; assignment allegedly arbitrary and capricious, and "wholly void"; on merits held discretionary act not subject to judicial interference)."

B. ANALYSIS OF THE AUTHORITIES

(*1*) *The basic cases in this Court*

By January 1925—and until May of that year—it was clear that the superior was an indis-

[11] See also *Bailey Gaunce Oil & Refining Co.* v. *Duncan*, 10 F. Supp. 280 (W. D. La.) (postal fraud order); *Brotherhood and Union, Etc.* v. *Madden*, 58 F. Supp. 366, 374 (D. Md.), reversed on another ground, 147 F. 2d 439 (C. C. A. 4); Notes, 50 Harv. L. Rev. 796, 801; 37 Col. L. Rev. 140, 142; 50 Yale L. J. 909, 916–917.

pensable party in any suit brought against a subordinate which attacked as invalid on any ground an order issued by the superior; and this was so regardless of whether the relief requested was affirmative (*Warner Valley* v. *Smith*; *Webster* v. *Fall*) or negative (*Gnerich* v. *Rutter*); or whether the plaintiff contended that the statute under which the superior acted was unconstitutional (*Webster* v. *Fall*), or that the superior had exceeded the authority vested in him by a statute (*Warner Valley* v. *Smith*; *Gnerich* v. *Rutter*), or that the superior had abused his discretion within the scope of authority conferred upon him by a valid statute (*Gnerich* v. *Rutter*; *Webster* v. *Fall*).

The holdings in each of these cases merely involved an application of the familiar definition of indispensable parties as "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." See, e. g., *Shields* v. *Barrow*, 17 How. 130, 139; *Barney* v. *Baltimore*, 6 Wall. 280, 284–285; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 456–457; *California* v. *Southern Pacific Co.*, 157 U. S. 229, 250; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 236; *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80. In none of the cases in question—*Warner Valley*, *Gnerich* and

Fall—could a decree have been entered without affecting the interest of the superior officer. This ended each case, for once it has been established that an indispensable party is absent, the proceeding must be dismissed. *Mallow* v. *Hinde,* 12 Wheat. 193; *Shields* v. *Barrow,* 17 How. 130; Amended Rules 12 (b) (7) and 12 (h), F. R. Civ. P., *supra,* pp. 4–6); and see the Advisory Committee's Notes to these amendments.[12]

It is immaterial that the decree would not be technically binding on the absent indispensable party. *Keegan* v. *Humble Oil & Refining Co.,* 155 F. 2d 971, 973 (C. C. A. 5); *Green* v. *Brophy,* 110 F. 2d 539 (App. D. C.); *Vincent Oil Co.* v. *Gulf Refining Co.,* 195 Fed. 434 (C. C. A. 5). And the fact that a joinder of the absent parties might deprive the court of jurisdiction does not make them any less indispensable. *California* v. *Southern Pacific Co.,* 157 U. S. 229; *Barney* v. *Baltimore,* 6 Wall. 280.

Applying the principles just discussed to the specific facts of an action to enjoin the enforcement of a postal fraud order results, necessarily, in the conclusion that the Postmaster General is an indispensable party to such a proceeding. For although, as in the case at bar, the action is nominally brought against the local postmaster,

[12] While the amended Rules will not go into effect until at least April 2, 1948, we feel justified in relying upon them as peculiarly authoritative expressions of what the law should—and will—be.

the real relief sought is against the action taken by his superior, the Postmaster General, and it is only by virtue of the circumstance that the fraud order is couched in terms which require the local postmaster to take action that there is any basis for even attempting to enjoin him. The postal fraud statutes authorize the Postmaster General, not a local postmaster such as the respondent here, to issue fraud orders, and require that the evidence upon which such orders are grounded be satisfactory to him and not to a local postmaster. Local postmasters do not participate in the issuance of such orders; they are not consulted; and they are not even necessarily aware of the basis for the Postmaster General's decision. They are informed of the fraud order only after it is issued and at that time they are instructed to put these orders into effect as agents of the Postmaster General. They must abide by these directions, and they are without discretion as to whether or not to obey the order. Their duties in respect of compliance with such an order are quite as ministerial as those of the postal clerks who actually stamp "Fraudulent" on the individual pieces of mail.[13] Moreover, as compared to *Gnerich* v.

[13] It may be significant in this connection that in *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116, *supra*, pp. 33–34, which is one of the leading cases that permits the action to be maintained in the absence of the Postmaster General, it appeared that the local postmaster was using the very product in respect of which his superior, the Postmaster General, had issued the fraud order. R. 81, 83, No. 9276, C. C. A. 6.

Rutter, the postal fraud order cases are much stronger for the application of the indispensable party rule. *Genrich* v. *Rutter* held that the bill could not be maintained in the absence of the Commissioner of Internal Revenue, although there the Commissioner had retained only responsibility and direction over the issuance of the liquor permits and had delegated authority and discretion to issue and sign liquor permits to subordinates, and the bill attacked a condition imposed in a license by the subordinate allegedly beyond the authority vested in him by the regulations. Here, on the other hand, as in all the postal fraud order cases, the local postmaster's functions are purely ministerial, and no authority or discretion is ever delegated to him.

(2) *Attempted reconciliations of the* Colorado *v.* Toll *departure.*

We have already canvassed at some length, *supra,* pp. 26–33, the impact of *Colorado* v. *Toll* upon the present question, the uncertainty which that decision engendered, and the attempts in the several circuits at reconciliation and rationalization. We now propose to consider the various grounds on which the *Toll* case has been distinguished, and the application of those distinctions to postal fraud order cases.

a. The Second Circuit suggested one distinction in its *Lotteries* case, 85 F. 2d 66, viz., that *Colorado* v. *Toll* involved the quasi-sovereign

rights of a State. This distinction is supported by the language of Mr. Justice Holmes in the *Toll* case, and by his citation of *Missouri* v. *Holland*, 252 U. S. 416, which was also a suit by a State. But *Missouri* v. *Holland*, though it was brought against a subordinate, did not touch the question of indispensable parties; it is, therefore, simply a case where that question lurked in the record, and consequently could not in its present aspect survive *Webster* v. *Fall*.[14] In any event, whether the plaintiff is a State or an individual is not a circumstance which would seem to be relevant in determining whom he or it must join as a defendant, or in deciding whether and under what conditions the superior officer is an indispensable party. And even if there were substance in the distinction—which we do not believe—then, since the plaintiff in postal fraud order cases is invariably an individual, *Colorado* v. *Toll* does not apply to such cases. From this it necessarily follows that the Postmaster General is an indispensable party here.[15]

b. A number of district courts have suggested that whether or not the superior is an indispensable party turns on the extent of the authority and discretion vested in the subordinate,

[14] We have already noted the inappositeness of the other authority cited in the *Toll* case; see note 5, *supra*, p. 25; compare pp. 42–46, *infra*.

[15] If the plaintiff's being a State is material, that circumstance would permit an original action to be brought in this Court—i. e., also in the District of Columbia.

and have held that joinder is necessary where the subordinate acts ministerially, on the view that then his acts are in fact those of his superior (*supra*, pp. 32–33). If this distinction is valid, then unquestionably the Postmaster General is an indispensable party to an action to enjoin a fraud order. *Ernest* v. *Fleissner*, 38 F. Supp. 326 (E. D. Wis.); *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.); *Wheeler* v. *Farley*, 7 F. Supp. 433 (S. D. Cal.), appeal dismissed, 293 U. S. 526.

c. The rule in the Ninth Circuit—the court below—is that the superior is an indispensable party when the exercise of his discretion is attacked, but not when a total lack of statutory authority is alleged. *Neher* v. *Harwood*, 128 F. 2d 846, certiorari denied, 317 U. S. 659, *supra*, pp. 28–29. There are several difficulties in the way of this view.

The first obstacle is that it rests on a misreading of the authorities; the Ninth Circuit in the *Neher* case erroneously interpreted *Webster* v. *Fall* as not involving an attack on the constitutionality of the statute, whereas in fact it did. Compare 128 F. 2d at 849 with 266 U. S. at 509. This circumstance is fatal to theoretical consistency between the *Fall* and *Toll* cases on the Ninth Circuit's attempted reconciliation.

A more practical difficulty with the Ninth Circuit's rule in the present connection is that the line between an assertion of lack of authority

and one of abuse of discretion under admitted authority is not easy to draw, as petitioner's brief indicates. If ever there was a situation where all statutory authority was reposed in one named officer, it is this one; only the Postmaster General is authorized to issue a fraud order, and then only "upon evidence satisfactory to him" (R. S. 3929, 4041, *supra*, pp. 2–4). It is for this reason that in many fraud order cases the Postmaster General is held to be an indispensable party. *Neher* v. *Harwood, supra; Dolphin* v. *Starr,* 130 F. 2d 868 (C. C. A. 9); *Acret* v. *Harwood,* 41 F. Supp. 492 (S. D. Cal.); *Gargilis* v. *Gleavy,* 45 F. Supp. 721 (D. Mass.); cf. *Barr* v. *Rhodes,* 35 F. Supp. 223 (W. D. Ky.). The assertion of arbitrariness or error in arriving at the conclusion is held not to be a challenge of the foundation of the authority, but to assail merely the manner of its exercise. *Acret* v. *Harwood,* 41 F. Supp. 492 (S. D. Cal.).

Yet petitioner attacks the Postmaster General's authority on the ground that he relied on opinion evidence, contrary to the substantive rule said to be laid down in *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94 (Pet. Br. 8–10)—and this in a case where the testimony in question was that of a medical expert as to the causes of obesity, a subject on which there is very little division in scientific opinion (R. 135). We pointed out in our Brief in Opposition in this case, pp. 16–20, why the opinion testimony of the medical expert, based as it was upon accepted

scientific facts, was not the type of opinion evidence condemned in the *McAnnulty* case (cf. *Leach* v. *Carlile*, 258 U. S. 138), and was sufficient to support the fraud order here involved. We do not repeat that argument here in view of the limited scope of the present writ of certiorari; but we mention the point by way of illustrating the practical unworkability of the attempted distinction between "lack of authority" and "abuse of discretion" as a touchstone for determining whether the superior is an indispensable party. That attempt in effect makes the question of parties turn on the final decision on the merits, and, as petitioner's argument here shows, ultimately bogs down in verbalisms.[16]

d. Although, as we have pointed out, the Ninth Circuit's distinction cannot be sustained on the basis of its reading of the cases, it finds support by analogy to the familiar line of cases which hold that where a government official has allegedly exceeded his statutory authority and is trespassing on plaintiff's property, a proceeding against him to enjoin such conduct is not a suit against the United States and the United States is not an indispensable party thereto. See, e. g., *United States* v. *Lee*, 106 U. S. 196; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S.

[16] For a similar yielding to verbalism, see *Pinkus* v. *Walker*, 61 F. Supp. 619 (D. N. J.), opinion modified *sub nom. Pinkus* v. *Reilly*, 71 F. Supp. 993, cited at Pet. 4, 6, 19, 42, 47. That case has been appealed.

82; cf. *Land* v. *Dollar*, 330 U. S. 731. As applied to the present situation, the argument would be that in those circumstances the superior officer is no more an indispensable party in a suit against a subordinate than is the United States. This distinction gains support from the circumstance that *Philadelphia Co.* v. *Stimson*, one of the leading cases on the suits-against-the-United-States point, was cited in *Colorado* v. *Toll* as authority on the indispensable party question, to which it otherwise has no relevance; and this line of distinction has in fact been accepted by numerous of the lower courts. *Eastman* v. *United States*, 28 F. Supp. 807 (W. D. Wash.); *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1008–1009 (S. D. Cal.); *Oklahoma* v. *Guy F. Atkinson Co.*, 37 F. Supp. 93 (E. D. Okla.), affirmed on another ground, 313 U. S. 508; *Gargilis* v. *Gleavy*, 45 F. Supp. 721 (D. Mass.); *Brotherhood and Union, Etc.* v. *Madden*, 58 F. Supp. 366, 373–374 (D. Md.), reversed on another ground, 147 F. 2d 439 (C. C. A. 4); *Grimes Packing Co.* v. *Hynes*, 67 F. Supp. 43 (D. Alaska); cf. *Varney* v. *Warehime*, 147 F. 2d 238 (C. C. A. 6), certiorari denied, 325 U. S. 882; see 158 A. L. R. 1126, 1127.

The analogy is not complete, since the result of holding the United States to be an indispensable party frequently will be that the plaintiff has only such remedies as the Tucker Act and the Federal Tort Claims Act may afford, whereas to hold that

the superior officer is an indispensable party does not affect the nature or extent of the remedy but only requires that it be sought in the District of Columbia. The real objection, however, to the suits-against-the-United-States analogy, is a more fundamental one, viz., that this would bring into the indispensable party question all of the uncertainty which now surrounds the suits-against-the-United-States point. In a word, this solution is no solution at all, but a remedy at least as bad as the ill which it seeks to cure.

(1) *United States* v. *Lee*, 106 U. S. 196, was a decision at October Term, 1882 (and hence prior to the Tucker Act), over the strong dissent of Mr. Justice Gray, with whom concurred Waite, C. J., and Bradley and Woods, JJ. Yet, at the very next Term, when the question arose again, the writer of the *Lee* opinion admitted that "the questions raised have rarely been free from difficulty," and that it is not "an easy matter to reconcile all the decisions of the court in this class of cases." *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451, *per* Miller, J. In 1941 the Court commented on that remark in *Brooks* v. *Dewar*, 313 U. S. 354, 359, saying, "The statement applies with equal force at this day"; it there declined to "attempt a critique of the authorities." And only this year the Court again had occasion to consider the decisions, after which it said that

"as a matter of logic it is not easy to reconcile all of them." *Land* v. *Dollar*, 330 U. S. 731, 738.

(ii) The extent of the existing confusion as to when and whether a suit is one against the United States is perhaps most dramatically illustrated by a comparison of two cases involving water rights on reclamation projects.

In *Ide* v. *United States*, 263 U. S. 497, this Court held that the United States, as *plaintiff*, had a sufficient property interest in the waters of the Shoshone River impounded in the Shoshone Project in the State of Wyoming to recapture seepage from project irrigation and to enjoin threatened interferences with such recapture. In *Ickes* v. *Fox*, 300 U. S. 82, this Court held that the United States did not have a sufficient property interest in the waters of the Yakima River impounded in the Sunnyside Project in the State of Washington to be an indispensable party *defendant* to a suit brought against the Secretary of the Interior to force delivery of additional water from the project under certain contracts. Obviously, if the United States has a sufficient property interest in the water to maintain a suit to enjoin a diversion of water it has a sufficient property interest to be a party to a suit seeking to compel a diversion of some of the same kind of water under an alleged contract right—and of course it has never been suggested that there

should be one rule of law for the Shoshone and another for the Yakima.

We are not suggesting here, at this juncture, a reexamination of the suits-against-the-United-States doctrine. We are urging, however, that that doctrine be not imported into the indispensable party question.

e. At least one circuit court of appeals has made the question of the Postmaster General's indispensability or otherwise turn on the form of the relief sought; in *Rood* v. *Goodman*, 83 F. 2d 28, the Fifth Circuit held that since the suit there was one to enjoin the local postmaster from seizing plaintiff's mail and from preventing its delivery, and not brought to set aside the fraud order (83 F. 2d at 31), the Postmaster General was not required to be joined as a party.

It seems reasonably clear that such a distinction is not helpful—particularly in the instant case, where the plaintiff seeks both kinds of relief (R. 269–270). In substance, of course, there is no difference between setting aside a fraud order on the ground that it is invalid, and enjoining enforcement thereof on the same ground. In either event it is the act of the Postmaster General which is drawn in question.[17]

[17] It may well be that the source of the Fifth Circuit's confusion was its reliance (83 F. 2d at 31) on *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, and on *Public Clearing House* v. *Coyne*, 194 U. S. 497, both of which had been declared inapplicable precedents in *Webster* v. *Fall*.

By the same token, it would be unprofitable to attempt a classification of the decisions on the basis of whether affirmative or negative relief was sought. In the present situation any such distinction would break down over the formalism of whether the prayer should be that the local postmaster be required to deliver the mail or forbidden to interfere with or prevent its delivery. Granting the relief couched in negative terms automatically results in affirmative delivery of mail being resumed. Moreover, while the *Warner Valley* and *Fall* cases involved prayers for affirmative relief, the plaintiff in *Gnerich* v. *Rutter* prayed for negative relief; the distinction finds no support there. And finally, this Court having concluded that any distinction between "negative" and "affirmative" served no useful purpose in one field of administrative law (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 143), there seems no valid reason why a distinction equally "unilluminating and mischief-making" (307 U. S. at 142) should now be resurrected to plague another aspect of judicial review.

f. Finally there are intimations in some of the discussions on the subject that the indispensability of the superior can be easily ascertained simply by asking whether the complaint asks relief which can be secured through compulsion of the subordinate alone, or—otherwise put—whether the

subordinate had authority or capacity to grant the relief prayed for.[18]

Whether these questions are determinative of the ultimate problem, depends, it is submitted, on how they are interpreted.

The local postmaster has the power to deliver mail and thus to give the plaintiff what he desires. But local postmasters are merely agents and subordinates of the Postmaster General. "They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations." *Gnerich* v. *Rutter*, 265 U. S. 388, 391–392. This quotation, the heart of the opinion in the *Gnerich* case, supplies what we conceive to be the answer.

If the subordinate has full authority to afford relief consistently with any directions given him by his superior, then there is no reason why the superior's presence is indispensable. This would cover all cases where there has been a complete delegation within the sphere of which the plaintiff

[18] Cf. Brief for Petitioner in *Brooks* v. *Dewar*, No. 718, Oct. T. 1940, at pp. 27, 33, 35.

seeks and can be granted relief. On the other hand, if the subordinate could only comply with the plaintiff's demand by violating or disregarding instructions from the superior, then, we submit, the superior is an indispensable party, because "his are the hands which would be tied." This rationale, then, is substantially the same elsewhere formulated on the ministerial vs. discretionary basis, *supra*, pp. 32–33, 39–40.

One other thought seems pertinent here with reference to the scope of relief in postal fraud order cases. If the plaintiff is permitted to sue a local postmaster, he gets relief at his residence; but if he moves to another place, there to continue his scheme, the Postmaster General's order can be enforced there regardless of the first injunction. If, however, the Postmaster General is made a party to the first proceeding and his order is held invalid, then the plaintiff is free of postal restraint wherever he may carry on the particular business or scheme in respect of which the order was issued.

(3) *Infirmities of the balance of convenience doctrine*

It remains only to consider the balance of convenience doctrine formulated by the Sixth Circuit, a doctrine which, unlike all of the others, involves no attempt to reconcile *Colorado* v. *Toll* with the other cases on indispensable parties decided by this Court.

We think that, for a number of reasons, the Sixth Circuit's rule cannot be supported.

a. The rule that relief cannot be granted in the absence of an indispensable party is not one of a technical character, but rests on "the plainest principle of justice." *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Edison Co.* v. *Labor Board*, 305 U. S. 197, 233. It is not a mere rule of equity, which despite the fulfillment of the conditions for its application may, because of the circumstances of the particular case, be waived in the court's discretion. *Mallow* v. *Hinde*, 12 Wheat. 193; *Shields* v. *Barrow*, 17 How. 130. Although originally not based on jurisdictional grounds, the rule has jurisdictional aspects, so that failure to point out the absence of an indispensable party *in limine* does not waive the infirmity and the court itself may raise it *sua sponte*. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *Texas* v. *Interstate Commerce Comm.*, 258 U. S. 158, 164; *Alcohol Warehouse Corp.* v. *Canfield*, 11 F. 2d 214, 216 (C. C. A. 2). In *Webster* v. *Fall*, the cause had gone to decree on the merits before the question was raised and in *Gnerich* v. *Rutter* the point was first raised on appeal. Amended Rule 12 (h), F. R. Civ. P., codifies this doctrine by providing that "the defense of failure to join an indispensable party" is not waived by the opposing party's failure to raise the point by motion or in his answer or reply. The addition of the quoted clause

to the Rule was said by the Advisory Committee to be "one of necessity." What the Sixth Circuit's doctrine does in effect, therefore, is to waive an objection which the parties themselves are powerless to waive, on which one of the parties has in fact been strenuously insisting, and which is, at the very least, quasi-jurisdictional. Cf. Rule 19 (b), *supra*, p. 6.

b. We do not believe, therefore, that the question whether a particular party is an indispensable one can properly be determined on considerations of the balance of convenience. But assuming, solely for purposes of argument, that considerations of convenience may be looked to, then we feel bound to point out that such considerations are not, as the Sixth Circuit seemed to feel, uniformly in the direction of permitting the action to proceed locally in the absence of the superior officer. Quite to the contrary, the balance of convenience runs strongly against any relaxation of the traditional rule that holds the superior to be an indispensable party and requires his presence.

The public has an interest in the proper defense of actions such as the one now under consideration. And the public interest is prejudiced by inadequate or uninformed representation of the defendant in an attack on an administrative order or proceeding, regardless whether the officer

concerned acted rightly or wrongly in the particular case.

In point of actual fact, actions to enjoin the enforcement of postal fraud order can be more adequately defended by the Government in the District of Columbia. The differentiating factors—the time element [19] and the lack of contact between the United States Attorney and the Post Office Department and its records if the action is

[19] Actions to restrain enforcement of fraud orders are frequently filed together with application for restraining orders, either *ex parte* or on five days' notice. The circumstance that every United States Attorney defends on directions from the Attorney General (R. S. 362, 5 U. S. C. 317)—actually, of course, from the appropriate division of the Department of Justice—has misled some courts and commentators into believing that there is no difference whether the action is brought in the District of Montana, say, or the District of Columbia. There is a difference in fact because of the time element.

The United States Attorney undertaking to oppose such applications must first forward the complaint to the Department of Justice to serve authorization to defend. Service is also made on the Attorney General pursuant to Rules 4 (d) (4) and 4 (d) (5), F. R. Civ. P., but in practice such service is often belated, and time runs from service on the United States Attorney. Moreover, delay invariably ensues if, as is generally the case, the complaint must be copied for the use of the Post Office Department in the preparation of affidavits in opposition to the application.

If a temporary stay is granted, then the case for all practical purposes is prejudged, and if the stay continues for any length of time it is the United States Attorney, on behalf of the defendant postmaster, who must persuade the court to disturb what has become the *status quo*.

permitted to proceed in the field [20]—affect the quality and effectiveness of the defense.[21] They do not similarly influence the presentation of the plaintiff's case. This Court has not failed in other connections to take notice of the difference between governmental and private litigation, particularly in respect of the time factor. See Rule 12 (a), F. R. Civ. P. (United States or officer or agency thereof has 60 days to answer complaint as against 20 days for private individual); *Virginia* v. *West Virginia*, 222 U. S. 17, 19–20

[20] The present case is unique, or nearly so, in that the transcript of the record before the Post Office Department and the Findings of Fact are attached to the complaint (R. 44–228). Usually the transcript is not attached and the findings only rarely. This means that, in the vast majority of instances, the United States Attorney is under the substantial handicap of having all his evidence in Washington. The Solicitor of the Post Office Department has no regional representatives, and the local postmaster, if not a mere indifferent bystander, cannot help even if so minded—and sometimes, as in *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116 (C. C. A. 6), *supra*, p. 37, note 13, he is himself one of the plaintiff's customers.

In the District of Columbia, on the other hand, the United States Attorney is much closer to the Post Office Department and to the Department of Justice; the time-lag is minimized; and the quality and quantum of the defense are substantially aided.

[21] The considerations discussed in the preceding two footnotes are additional to one which is not susceptible of objective proof, viz., the greater familiarity with, and the greater opportunity for acquiring familiarity with, postal matters, which obtains in the District of Columbia in comparison with other judicial districts.

("* * * a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed"); cf. Rule 55 (e), F. R. Civ. P. (limitation on default judgment against United States or officer or agency thereof).

And while the disadvantages noted might not be too burdensome in a few cases, the fact of the matter is that, in view of the marked expansion of governmental activity in recent years, the volume of litigation has increased immeasurably. Quite a number of courts have therefore noted that to permit attacks on the actions, orders, or regulations of the numerous government officials charged with the responsibility therefor in district courts elsewhere than in the District of Columbia, would disrupt the regular course of business and "introduce chaos into our governmental system." *Acret* v. *Harwood,* 41 F. Supp. 492, 494 (S. D. Cal.); *Smith* v. *Farley,* 38 F. Supp. 1012, 1014 (S. D. N. Y.); cf. *United States* v. *Shaw,* 309 U. S. 495, 502. Moreover, as pointed out by Judge Learned Hand in *National Conference on Legalizing Lotteries* v. *Goldman,* 85 F. 2d 66, 67 (C. C. A. 2), unless the superior is joined, the subordinate will be under a duty to obey the mandate of the court, and at the same time be subject to the conflicting commands of his superior who is under no legal compulsion to revoke

them. Not only might such litigation dislocate government business, but it makes possible a multiplicity of actions throughout the country which may be so voluminous as to impede, by design or accident, the government's functions. That this is not an imaginary horrible, but a very real danger in connection with regulatory legislation which affects powerful economic elements of the community, is amply demonstrated by *Landis* v. *North American Co.*, 299 U. S. 248.

A plaintiff's presentation is not similarly affected by considerations of time, and he has full and effective contact with counsel before the action is commenced. Cf. *United States* v. *Johnson*, 323 U. S. 273. The only corresponding inconvenience he can show, in consequence of being required to sue the superior, is that he must bring his action in the District of Columbia. That factor may loom larger in the present case, where the plaintiff hails from California, than it would if we were here concerned with a fraud order directed to a postmaster in Virginia or Maryland. In truth, however, inconvenience of this kind is simply an inescapable consequence of the fact that the United States is a large country whose seat of government is localized at one place. Californians who desire to appear before committees of Congress when Congress is in session or who have causes before this Court or the several legislative courts located in the District

of Columbia are similarly incommoded by comparison with Eastern citiens.[22]

Proceedings to enjoin postal fraud orders are readily brought in Washington, D. C.[23] Moreover, and this we deem determinative in the postal fraud order situation, the individual against whom a charge of fraud is made by the Post

[22] Instead of requiring citizens to come to the seat of government, the seat of government could conceivably ride circuit and go to the citizens. Under the Rhode Island Constitution originally adopted, as under the Royal Charter of 1663, the General Assembly met, in turn, at the several county seats. R. I. Const. (1842), Art. IV, Sec. 3. After 1854 and until 1901, it met alternately at Providence and Newport. Art. of Amendment III. Providence did not become the sole capital until 1901. Art. of Amendment XI, Sec. 1.

The Supreme Judicial Court of Massachusetts still sits *en banc* at several places within the Commonwealth. Mass. Gen. Laws (Ter. ed. 1932), c. 211, §§ 12, 13. And under Jud. Code, Sec. 126 (28 U. S. C. 223), five of the ten circuit courts of appeals are itinerant in fact as well as in law; another, the Circuit Court of Appeals for the First Circuit, is empowered to sit at San Juan, P. R., but, so far as we are aware, has never done so.

[23] E. g., *Plapao Laboratories* v. *Farley*, 92 F. 2d 228 (App. D. C.), certiorari denied, 302 U. S. 732; *National Conference on Legalizing Lotteries* v. *Farley*, 96 F. 2d 861 (App. D. C.), certiorari denied, 305 U. S. 624; *Farley* v. *Simmons*, 99 F. 2d 343 (App. D. C.), certiorari denied, 305 U. S. 651; *Farley* v. *Heininger*, 105 F. 2d 79 (App. D. C.), certiorari denied, 308 U. S. 587; *Pike* v. *Walker*, 121 F. 2d 37 (App. D. C.), certiorari denied, 314 U. S. 625; *Consumers Union* v. *Walker*, 145 F. 2d 33 (App. D. C.); *Esquire, Inc.* v. *Walker*, 151 F. 2d 49 (App. D. C.), affirmed *sub nom. Hannegan* v. *Esquire*, 327 U. S. 146; *Cable* v. *Walker*, 158 F. 2d 23 (App. D. C.), certiorari denied, 328 U. S. 860; *Hannegan* v. *Read Magazine*, No. 50, this Term.

Office Department must come to the District of Columbia if he desires to defend at the hearing that precedes the issuance of a fraud order. That Department has no deposition procedure, and no power to subpoena witnesses. See Sen. Doc. 186, 76th Cong., 3d sess., Part 12, *supra*. All this follows from the statutes which lodge sole and exclusive power in respect of postal fraud orders in the Postmaster General. Since, therefore, the individual is required in consequence of the Act of Congress to defend himself in the District of Columbia against issuance of a fraud order by the Postmaster General, it does not seem unreasonable or undul inconvenient to require him to sue the Postmaster General at the same place in any proceeding which attacks the fraud order as invalid. Certainly until Congress sees fit to decentralize the issuance of fraud orders there would seem to be no valid or compelling ground of convenience on which to base decentralization of attacks on the validity of fraud orders.

c. Congress has not provided any applicable exception to the general provision that an action in a federal court that is not based solely upon diversity of citizenship may not be brought against any defendant in a district of which he is not an inhabitant. Judicial Code, Sec. 51, 28 U. S. C. 112. As a result, heads of departments and other superior officials are usually not ame-

nable to service except in the District of Columbia, and hence if the indispensable party requirement be applied, suit may not be maintained elsewhere to review their orders unless they appear voluntarily. The Sixth Circuit by proceeding with the suit despite the absence of the superior official has in effect written its own exception into the Judicial Code.

Congress has, in the case of many agencies and officials charged with the administration of various regulatory statutes, provided that the actions, orders or regulations of these agencies and officials may be reviewed elsewhere than in the District of Columbia. See, *e. g.*, National Labor Relations Act, 29 U. S. C. 160f; Fair Labor Standards Act, 29 U. S. C. 210; Securities Act, 15 U. S. C. 771 (a); Public Utility Holding Company Act, 15 U. S. C. 79x (a); Federal Trade Commission Act, 15 U. S. C. 45c; but see Federal Communications Act, 47 U. S. C. 402b. On the other hand, Congress has laid down the requirement in the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505, 28 U. S. C. 41 (20)) that all claims over $10,000 against the United States and all claims for pay or salary must be filed at the seat of government.[24] This limitation seems to have

[24] Most of the states which have consented to suit have likewise prescribed a forum at the seat of the government. The States of Alabama, Illinois, and Michigan have established a court or board of claims holding its sessions at the capital. Cumulative Supplement to the Code of Alabama,

been based on the fear of dislocation of government business which would attend the granting of blanket permission to sue in federal district courts generally. Cf. *United States* v. *Shaw*, 309 U. S. 495, 502; *Davis* v. *West Virginia Bridge Comm.*, 113 W. Va. 110; *Greene* v. *Wolf*, 175 Ky. 58, 61–62. It might well be that such fear has restrained the Congress from excepting the higher government officials, such as the Postmaster General, from the provisions of Section 51 of the Judicial Code and from authorizing, as in effect the Sixth Circuit does, courts other than those in the District of Columbia to review orders of superior government officials. Where Congress has anticipated a multiplicity of suits in such volume that the statute itself might prove unenforceable, as in the Emergency Price Control

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1940, Title 55, Sec. 333, as amended; Jones, *Illinois Statutes Annotated*, Vol. 27, Sec. 126.057 *et seq.*; Mich. Stats. Ann., Sec. 3.461. Others, including California, Indiana, Massachusetts, Mississippi, Nebraska, Virginia, Washington, and Wisconsin, have consented to be sued in a court of ordinary jurisdiction but have either expressly limited jurisdiction to the court of the county in which the seat of the government is located, or authorized a change of venue to that county on motion of the Attorney General. Deering, *Political Code of California*, 1937, Sec. 688; Burns, *Indiana Statutes Annotated*, 1933, Sec. 4–1501; Annotated Laws of Massachusetts, 1933, Vol. 9, c. 258, Sec. 1; Mississippi Code of 1942, Sec. 4387; Revised Statutes of Nebraska, 1942, 24–324; Virginia Code of 1930, Sec. 2578; Remington, *Revised Statutes of Washington Annotated*, 1932, Title 6, c. 4, Sec. 886; Wisconsin Statutes (1945) 261.01.

Act, it has narrowed the scope and manner of judicial review accordingly. See *Yakus* v. *United States*, 321 U. S. 414. In the absence of Congressional action, either permitting review of orders and regulations elsewhere than at the seat of government, or narrowing the kinds of proceedings which may be brought, we submit that it was not for the Sixth Circuit, by introducing concepts of convenience which Congress had not seen fit to write into the postal statutes, to permit a fraud order issued by the Postmaster General's to be set aside in his absence.

C. PROJECT FOR A WORKABLE SOLUTION

If we were here concerned simply with the resolution of the particular case before the Court, the application of the several groups of decisions discussed would require affirmance of the judgment below. For under all or nearly all of the formulas evolved for reconciling *Colorado* v. *Toll* with the *Warner Valley-Gnerich-Fall* line, the Postmaster General would be an indispensable party to proceedings to enjoin the enforcement of postal fraud orders.

He would be on the interpretation of *Colorado* v. *Toll* as applying only to suits by States, *supra*, pp. 38–39, for petitioners here are individuals. He would be under the rule that the superior is an indispensable party where the subordinate has acted ministerially only and has not deviated from

the terms of the superior's commands," *supra*, pp. 39–40, for assuredly respondent here has obeyed to the letter the direction he received from the Postmaster General. He would be under the Ninth Circuit's distinction between an attack on a statute or a contention of lack of statutory authority as distinguished from a complaint going to the exercise of admitted authority, *supra*, pp. 40–42, because the amended complaint here does not assail the statute, the Postmaster General is the only officer empowered by law to issue a fraud order, the statute says it may issue "upon evidence satisfactory to him," and the only substantive question is whether the evidence which was in fact satisfactory to him is in law sufficient to sustain the order. And the Postmaster General would also, we submit, be an indispensable party if such a question can properly be determined upon considerations of convenience; for the balance of convenience, giving due weight to the public interests involved and to the centralized statutory scheme provided by Congress for the issuance of fraud orders, favors the conclusion that since such orders can only be issued by the Postmaster General, they should not be set aside nor their enforcement enjoined except in a proceeding to which the Postmaster General is a party.

But while these views would dispose of the present case, they would not settle or resolve what is

one of the most uncertain situations in current administrative law.

As the discussion and analysis of the decisions above demonstrate, there is no way, if the cases are accurately read, to reconcile the *Warner Valley, Gnerich,* and *Fall* cases with the decision in *Colorado* v. *Toll.* The fact of the matter is that the two lines of authority are irreconcilable, and that one or the other must give way.

As we have already pointed out in some detail, the *Warner Valley-Gnerich-Fall* line of cases is consistent with accepted equitable rules of who is and who is not an indispensable party. The disposition made of those particular controversies is consistent with the principles of the Federal Rules of Civil Procedure. The *ratio decidendi* of those cases conforms to that of the numberless other decisions dealing with who are indispensable parties in suits brought against private defendants not holding public office.

Colorado v. *Toll,* on the other hand, rests, we respectfully submit, on the citation of inapplicable authorities, and is inconsistent with normal and settled equitable principles. It is inconsistent with the Federal Rules of Civil Procedure, and does not conform to the standard laid down in private law cases for determining who is and who is not an indispensable party to actions seeking injunctions against nongovernmental individuals.

We think that there is no sound basis for laying down one rule of indispensability in an action against a private corporation and its agents or subsidiaries and another for an action against a public officer and his agents or employees. The very premise of permitting a public officer to be sued is that he must answer as an individual for excess or abuse of official action; he is not above the law, he will be dealt with as any other person. Conversely, therefore, he should be answerable on an equal footing with respect to opportunity to defend—which is a matter of substance and not merely an equalizing of the time-lag attributable to the often ponderous creaking of the machinery of government. It is not logical, nor is it right, to apply to him a different rule as to notice and hearing, and to hold that his acts, his orders, his determinations, may be set aside in his absence.

We believe, therefore, that the true rule is that an action seeking equitable relief can proceed in the absence of the superior only when the subordinate's authority, under a statute and within the order given by his superior, is sufficient to grant the relief sought. Where, however, all power and all discretion are vested in the superior, where the order or decision attacked has been made by the superior, then he is an indispensable party, and relief cannot be granted in his absence.

Such a rule is consistent with accepted principles. It is workable. It does not break down in verbalisms or scholastic distinctions. And it relieves the lower courts of the burdensome legal acrobatics to which they have been profitlessly subjected these last twenty years or so. True, the formulation of the proposed rule would involve the demise of *Colorado* v. *Toll,* 268 U. S. 228, but as that case represents a departure from established principles, it cannot be deemed guiding or controlling. It should now "be allowed a deserved repose." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 570, *per* Holmes, J., dissenting. This Court has not heretofore hesitated to overrule a decision on a point of procedure which was similarly "a departure", "a source of embarrassment and confusion in other courts", and which "on further consideration we feel constrained to pronounce * * * essentially unsound." *Lee* v. *Chesapeake & Ohio Ry.,* 260 U. S. 653, 659, 660, overruling *Ex parte Wisner,* 203 U. S. 449, and qualifying *In re Moore,* 209 U. S. 490.

Litigants and courts alike will profit from the resultant certainty, and Congress will still be free to provide for decentralized review of administrative orders whenever it considers that the public interest would thereby be advanced.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1947.

Al Williams and Al Williams Health System of Los Angeles, Inc., Petitioners, v. Michael J. Fanning, Individually and as Postmaster of the City of Los Angeles, California.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 8, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to resolve a conflict between the circuits,[1] presents the question whether those against whom the Postmaster General has issued a postal fraud order may sue the local postmaster to enjoin him from carrying out the order or whether the Postmaster General is an indispensable party.

The Postmaster General, after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order (R. S. §§ 3929, 4041, 39 U. S. C. §§ 259, 732) directing respondent, postmaster at Los Angeles, California (where petitioners do business) to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all mail matter directed to petitioners and to return it to the senders.

[1] The Circuit Court of Appeals in the instant case followed its earlier decisions holding that the Postmaster General was an indispensable party. *Neher* v. *Harwood*, 128 F. 2d 846; *Dolphin* v. *Starr*, 130 F. 2d 868. Accord: *National Conference* v. *Goldman*, 85 F. 2d 66 (Second Circuit). Contra: *Jarvis* v. *Shackleton*, 136 F. 2d 116 (Sixth Circuit). For collection and review of the cases see 158 A. L. R. 1126.

Petitioners thereupon brought this suit in the District Court for the Southern District of California to enjoin respondent from carrying out the order,[2] claiming that they had been deprived of the hearing to which they were entitled and that the fraud order was without the support of substantial evidence. On motion of respondent the District Court dismissed the complaint, holding in accord with the view of the Ninth Circuit Court of Appeals[3] that the Postmaster General was an indispensable party. The Circuit Court of Appeals affirmed. 158 F. 2d 95.

It was long assumed that the Postmaster General was not an indispensable party in these fraud order cases. Beginning at least with *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, decided in 1902, the maintenance of the suit against the local postmaster alone was not challenged.[4]

Meanwhile, another line of cases was emerging. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, held that a suit against the Secretary of the Interior to compel him to issue patents to public lands abated on his resignation. As the purpose of the bill was "to control the action of the Secretary of the Interior" (165 U. S. p. 34), he was held to be an indispensable party. Next came *Gnerich* v. *Rutter*, 265 U. S. 388, which was a suit to enjoin a representative of the Commissioner of Internal Revenue from enforcing a restriction embodied in a permit issued under the National Prohibition Act. The subordinate official, acting for the Commissioner, had refused to give plaintiffs the more liberal permit which they desired; and he had no power to grant the desired permit without revision of his delegated authority. The Commissioner was held

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[2] Jurisdiction was invoked under § 24 (6) of the Judicial Code, 28 U. S. C. § 41 (6).

[3] See note 1, *supra*.

[4] And see *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Leach* v. *Carlile*, 258 U. S. 138.

to be an indispensable party. *Webster* v. *Fall*, 266 U. S. 507, followed. That was a suit brought by an Osage Indian to require payment to him of funds under an act of Congress. The power and responsibility of making the payments being in the Secretary of the Interior, he was held to be an indispensable party.

These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.

That principle was brought into clearer relief by *Colorado* v. *Toll*, 268 U. S. 228. There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. That result followed, 268 U. S. p. 230, by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. *United States* v. *Lee*, 106 U. S. 196; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620. In those situations relief against the offending officer could be granted without risk that the judgment awarded would "expend itself on the public treasury or domain, or interfere with the public administration." *Land* v. *Dollar*, 330 U. S. 731, 738.

But the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us. For a conflict among the circuits developed in these postal fraud cases.[5] *National Conference* v. *Goldman*, 85 F. 2d 66, which held that the Postmaster

[5] See note 1, *supra*.

General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BURTON dissent.